

Gatliff Coal Company and Rebecca L. Carpenter.
Case 9-CA-27092

February 21, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On September 28, 1990, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Gatliff Coal Company, Nevisdale, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge inadvertently stated that Vivian Cordell testified that there were times when Cordell would have to leave her work station for a few hours; Cordell actually testified that it was Charging Party Rebecca Carpenter who would have to leave.

Deborah R. Grayson, Esq., for the General Counsel.
Robert L. Thompson, Esq. and *Joseph M. Freeman, Esq.*, for
Gatliff Coal Company.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Williamsburg, Kentucky, on May 22 and 23, 1990, pursuant to charges timely filed and served on December 13, 1989, and complaint issued on February 2, 1990, alleging Gatliff Coal Company (Respondent) discharged Rebecca Carpenter and Diane Taylor on September 26, 1989,¹ because they engaged in protected concerted activity, and thereby violated Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent agrees it discharged these two women on September 26, but asserts the discharges were for lawful cause rather than the reason alleged in the complaint.

After considering the entire record, the testimonial demeanor of the witnesses as they testified, and the able posttrial briefs of the parties, I make the following

¹ All dates are 1989 except where otherwise noted.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with office and place of business in Nevisdale, Kentucky, is engaged in coal mining in and around eastern Kentucky. During the 12 months preceding the issuance of the complaint, Respondent, in the course and conduct of operating these operations, sold and shipped products, goods, and materials valued in excess of \$50,000 directly from its Kentucky facilities to points located outside the State of Kentucky. Respondent has been at all times material to this proceeding an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. SUPERVISORS AND AGENTS

The complaint alleges, Respondent admits, and I find that at all times material, the following named persons have occupied the positions set forth opposite their respective names and are now, and have been at all times material, supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Jim Shackleford	President
Clark Taylor	Vice President
Jim Faulkner	Personnel Director
William Stark	Assistant Controller

III. THE ALLEGED UNFAIR LABOR PRACTICES²

Rebecca Carpenter has been employed by Respondent since August 1987 as a receptionist/switchboard operator. Diane Taylor began her employment on June 4, 1979, and was a payroll clerk for the 3 years immediately preceding her discharge. Both women were given excellent ratings on job understanding, job performance, job productivity, dependability, and cooperation on their annual evaluations signed by William Stark and Clark Taylor on or about September 8,

² Rebecca Carpenter and Diane Taylor were impressive witnesses both of whom testified in a straightforward, detailed, certain, and believable manner. Their testimony is consistent with respect to events of which both have knowledge and provide complementary, believable detail to each other's recollections. William Stark and Clark Taylor, on the other hand, gave meandering and circumlocutory testimony couched largely in generalities with respect to critical matters. The testimony of Stark and Clark Taylor was not as convincing as that of R. Carpenter and D. Taylor, nor was their demeanor as impressive as that of the two women. Accordingly, the testimony of Stark and Clark Taylor, in the absence of any other convincing corroborative evidence thereof, is not credited where it conflicts with that of R. Carpenter and D. Taylor. Moreover, Respondent's failure to call Jim Shackleford, Respondent's president, Personnel Director Jim Faulkner, Vice President Fred Maggard, and Production Manager Bob Zik as witnesses, all of whom allegedly complained of the performance of R. Carpenter and D. Taylor, and two of whom, Shackleford and Faulkner, played critical roles in the decision to discharge according to Clark Taylor, warrants an inference their testimony would not have supported Respondent's defense. There is no explanation proffered by Respondent for its failure to call these persons who are presumably friendly to Respondent's cause. In arriving at my findings of fact I have weighed these considerations together with the testimony and exhibits of record and the reasonable probabilities in the circumstances. Testimony that might appear to conflict with my findings of fact has been examined and rejected as less credible than that upon which I have relied. I have credited parts of witnesses' testimony while not crediting other parts, which is neither unusual or improper. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950), vacated on other grounds 340 U.S. 474 (1951).

1988. Respondent raises no question concerning their work performance in 1988.

It is not uncommon for employees to form into small groups of similar likes and dislikes which create problems in the workplace because these groups generate rumors and intrigue against each other. This, I conclude, is what happened at Respondent's establishment and resulted in the rumors which General Counsel alleges caused complaints to management by Rebecca Carpenter and Diane Taylor for which they were discharged. To understand the genesis of the rumors complained of, and to provide some slight assistance in evaluating the testimony in this case, a brief recitation of the personal relationships involved here is helpful. A central figure is Larry Strunk, an electrical systems analyst, who had a personal relationship with employee Vickie Croley, and is a friend of the alleged discriminatees and their husbands. When the relationship between Strunk and Croley soured, Croley and Karen Hamblin circulated rumors that Strunk was having an affair with R. Carpenter and D. Taylor.³ Strunk testified and is credited that William Stark, Respondent's assistant controller, also dated Vickie Croley, resented Strunk, and gossiped to others about him.⁴

The rumors about R. Carpenter, D. Taylor, and Strunk apparently started in the spring of 1989. D. Taylor attempted to squelch the rumors in August by asking Croley and Hamblin to stop circulating them. On or about August 13, she told Stark what she had done. He told her not to worry about it. R. Carpenter had earlier talked to Hamblin about the rumors, and advised Clark Taylor, vice president and controller, that Hamblin was the rumor monger. He advised her to ignore the rumor.

On the afternoon of August 15, William Stark called R. Carpenter into his office. He advised her the rumor had not died down and Clark Taylor had said she should be fired as an example to deter the rumor, but had directed him to tell R. Carpenter to stay in her office and do her job and there would be no problems. He told R. Carpenter just to do as she had done in the past and that she had always done a good job. According to R. Carpenter, denied by Stark, he propositioned her for sexual favors. This is only significant because her claim caused the Respondent considerable concern. I make no finding regarding the truth of this claim. He then had D. Taylor called in. Then he said that Clark Taylor had asked him about a rumor that Strunk was having an affair with two women at Gatliff Coal, and he, Stark, thought D. Taylor and R. Carpenter were the two women. He then said that Clark Taylor had wanted to fire them as an example, but he had defended them by advising he had no problems with them and that when he found them out of their duty stations they were doing their job. Stark instructed them to stay in their work area as much as possible and report to him, Clark Taylor, or accountant Deborah Huddleston if they had to leave the accounting department. According to R. Carpenter, Stark also said Clark Taylor had told him to similarly instruct everyone. Clark Taylor and Stark agree that Stark was instructed to tell these two ladies to stay in their work areas, spend less time on the phone, and report to Clark Taylor or Stark when leaving the department. Inasmuch as Hud-

leston is in charge when the two men are absent, I conclude Stark did name Huddleston as an appropriate person to whom to report. From the testimony of Stark and Clark Taylor, questionable though it may be in other respects, it appears, and I find, that Clark Taylor initiated the August 15 meeting by directing Stark to meet with the two women. The record shows no reason for Stark to attempt to ingratiate himself with R. Carpenter and D. Taylor by falsely telling them he had talked Clark Taylor out of firing them because they were the subjects of the rumor. He did so tell them, and I believe it likely, notwithstanding his protestation and those of Clark Taylor to the contrary, that he correctly related his conversation with Clark Taylor to the women as they report it. Finally with respect to this August 15 meeting, Respondent placed a document in evidence purported by Stark to be a memorandum setting forth what there occurred. It reads, in its entirety, as follows:

On August 15, 1989, I met with Becky Carpenter and Diane Taylor to advise them that their work had become sub-standard and that they were spending too much time away from their work stations and too much time was being spent in areas where they had no business.

I told them we had too much to do to waste time and from now on everyone was to notify me or Clark before leaving their work stations and I advised them to stay out of other people's offices and to keep other employees out of their offices.

I have credited the version of that meeting advanced by D. Taylor and R. Carpenter. I do find it interesting however that the memo states "everyone" was directed to notify of their absences from the area, thus indicating there may well have been a general practice of unnecessarily leaving the working area. In any event, the memorandum has little probative weight. It was not prepared until September 15, 1 month after the event, it is not a substantially verbatim recitation, clearly is not a description of everything that occurred in a meeting in excess of 3 hours, does not relate the conversation credibly testified to by D. Taylor and R. Carpenter, and is nothing more than a self-serving, incomplete, and unpersuasive summary of little evidentiary value.

R. Carpenter and D. Taylor decided to talk to Clark Taylor because they feared losing their jobs over the rumor, but Clark Taylor was out of town on business. They decided they would talk to Respondent's president, Jim Shackelford. They met with him at 7 a.m. on August 16, told him they were concerned that they might be fired to stop a rumor, and reported what Stark had said to them. This included R. Carpenter's claim, not witnessed by D. Taylor, that Stark had sought her sexual favors. Shackelford assured them they could not be fired to set an example, declined to speak to Hamblin and Corley as they requested, and suggested they just let the rumor die out by itself. He also advised them to talk to Clark Taylor. As previously noted, Shackelford did not testify.

Shackelford told Clark Taylor that R. Carpenter and D. Taylor were concerned about the rumors and that Stark had allegedly made a sexual suggestion to R. Carpenter. I credit Taylor on this point because it is probable that Shackelford did so instruct. Clark Taylor then met with the two women

³D. Taylor and R. Carpenter credibly testified Croley and Hamblin admitted starting the rumor. Hamblin, testifying on other matters, does not deny her part in the rumor.

⁴ Stark does not deny this testimony.

on Friday, August 18 or Monday, August 21. The date is not significant. Taylor and the two women are in substantial agreement as to what happened at this meeting. Clark Taylor denied telling Stark he wanted the two women fired, stated they would not be fired because of a rumor, and told them Stark was instructed to tell them to spend less time on the phone and to stay in their work areas. He also told them their work had been good and the only problems he had with them was that D. Taylor through no fault of her own had failed to cause checks to be ordered in the spring, and that R. Carpenter was not as enthusiastic an employee as she had been because she was being cross-trained and being moved from one job to another, but this would be taken care of. After these exchanges between the three, they met with Stark. It was agreed by the participants that there may have been some misunderstanding concerning Stark's alleged sexual remarks. This meeting closed with instructions from Clark Taylor that Stark was the supervisor, should be obeyed, and should treat the women fairly. He opined that the rumor would blow over, and instructed the two women to stay in their work area and to inform their supervisor if they had to leave that area for any reason.

On the morning of September 26, R. Carpenter and D. Taylor had separate meetings with Clark Taylor, Jim Faulkner, and Jim Shackleford wherein they were discharged. Clark Taylor testified that he told D. Taylor she was fired for insubordination to Stark and being away from the work area, and told R. Carpenter the reasons for her dismissal were absence from her work area, her work had fallen off, and she had incorrectly typed a letter the previous week. D. Taylor and R. Carpenter agree they were so told, but credibly testify to additional comments made. D. Taylor recalls that Clark Taylor advised her she was terminated at Stark's request because she misused the telephone, was generally insubordinate and uncooperative in the previous couple of months, was away from her work area, and had failed to order checks 6 months previously.⁵ Clark Taylor further stated to D. Taylor that Larry Strunk had said she and R. Carpenter hindered him in his job performance by calling him on the phone, coming to his office, and stopping him from working.⁶ R. Carpenter relates that Clark Taylor said he would have to let her go because Stark had reported she would not do as he asked, she was insubordinate, he could not get any work out of her, and she was on the phone constantly. Clark Taylor added that she had taken 2-1/2 hours the previous week to type a letter which Teague had retyped in 15 minutes because hers was wrong. As she left the meeting, Faulkner added that Larry Strunk had complained she was calling and harassing him. The failure of Faulkner and Shackleford to testify persuades me their testimony would not have contradicted D. Taylor or R. Carpenter. Larry Strunk's testimony that he never spoke to Stark about D. Taylor and R. Carpenter, and did not say they would not leave him alone is credited.

Turning to the reasons advanced by Respondent for discharging R. Carpenter and D. Taylor, I first note that Respondent's argument in its posttrial brief to the effect that the discharge of Larry Strunk on September 26 "establishes that [the women] would have been terminated regardless of their

alleged protected, concerted activity" can be charitably described as without merit. The coincidence of the three discharges on the same day might more likely suggest they were a device designed to stifle the rumor with which the women had expressed concern.

Respondent argues in its posttrial brief that the discharges were caused by insubordination and absence from the work area. Clark Taylor said: "My decision to terminate them was based on the fact that they were leaving their work areas, they both became uncooperative with Bill Stark and uncooperative with other employees in the office, and that's exactly why there were terminated." At another point in his testimony he states, "Diane Taylor, I told her the reason for her's was insubordination and being away from her work area, being insubordinate to Bill Stark which I had reports of that and that was her reason, and to Becky Carpenter it was being away from her work area. She had also—in terms of her work itself, had fallen off, and firstly, I pointed out to her the letter as an example that she had typed for Vivian which Vivian and Bill Stark both said it took her almost three hours to do, and then she gave it to Vivian and told her to finish it up herself which I considered really uncooperative and that's why I let Becky Carpenter go when I told her." At another point he said the decision to discharge was made by Shackleford because the employees were leaving the work areas and were insubordinate. Notwithstanding the basic contention advanced by Respondent that insubordination and absence from the work areas caused the discharges, Respondent and its witnesses advert to other matters, notably the failure of D. Taylor to cause checks to be ordered in April, the letter typed by R. Carpenter on September 22, and a complaint by Larry Strunk the two were impeding his work. The advice to D. Taylor and R. Carpenter during their exit interview that Strunk had so complained has been found to be false.

With respect to the failure of D. Taylor to timely notify Huddleston to order payroll checks in April, I credit Stark that he reprimanded D. Taylor for this omission, but the written reprimand he prepared for the file on April 3 concerning the problem which arose on March 24 due to the lack of sufficient checks does relate that "there was some question in my mind as to whether proper safeguards were in place to prevent this type of thing from happening. We are now implementing safeguards" That there were no proper safeguards in place at the time D. Taylor failed to cause the checks to be ordered does not change the fact the reprimand may have been warranted. D. Taylor avers this reprimand was not in her personnel file when she reviewed it in July. Mary Taylor, personnel secretary, denies that Diane Taylor reviewed her file in July. Whether Diane Taylor reviewed her file in July or whether Stark caused the reprimand to be put in her personnel file need not be resolved. There is no evidence the reprimand is of recent invention for purposes of litigation, and I conclude it was prepared as Stark claims, and reflects what he told Diane Taylor. I further conclude, however, that the resurrection of a 6-month-old unrelated incident to support a discharge for insubordination and excessive absences from the work station raises some suspicion concerning the bona fides of the reasons relied on. The same is true of Respondent's reference to the letter typed by R. Carpenter on September 22. On that day R. Carpenter had permission to leave at 4 p.m. to visit a dentist. At 3:30 p.m.,

⁵ Clark Taylor can't remember if the check incident was mentioned.

⁶ Clark Taylor thinks the continued presence of the women in Strunk's office was mentioned during the exit interviews.

as D. Taylor was leaving, Vivian Cordell, a nonsupervisory employee in the accounting department, gave R. Carpenter a royalty letter to type. The letter did not have to be mailed until the following Monday, but Cordell told R. Carpenter she wanted it done that Friday. R. Carpenter typed it, proof-read it with another employee, and gave it to Cordell at 4 p.m. Cordell and Mark Teague retyped it because the margins were incorrect, and dated it September 25, the following Monday. Cordell does not recall the hour when she gave the letter to R. Carpenter, but estimates it was between 2 and 3 p.m. Diane Taylor's definite testimony that she saw Cordell give the letter to R. Carpenter at 3:30 p.m., Diane Taylor's departure time, is convincing and credited. None of this testimony supports Taylor's contention at the exit interview that R. Carpenter spent 2-1/2 hours on the letter.

With respect to absences from the workplace, Clark Taylor testified that his August 15 instructions to Stark to restrict the movements of D. Taylor and R. Carpenter grew out of his personal observation that they were absent from the department on five or six occasions, and complaints from Bob Zik, Fred Maggard, Jim Shackleford, Karen Hamblin, Ron Yancey, Larry Lambdin, Vivian Cordell, Vickie Croley, and Deborah Huddleston. Zik, Maggard, Shackleford, Lambdin, and Croley did not testify and there is no evidence other than Taylor's bare claim that they did indeed complain about the alleged peregrinations of D. Taylor and R. Carpenter.

Hamblin, one of the circulators of the rumor the two women complained of, testified that D. Taylor's visits to the engineering department were quite often in 1989, at one point several trips a day but later slacking off, but she does not know where Taylor went in the department or how long she remained. Hamblin also recalls R. Carpenter was in the engineering department several times in 1989, but they "weren't that frequent, or that I noticed or I observed." She does not say whether she reported the visits of D. Taylor and R. Carpenter to anyone.

Ronald Yancey, an underground surveyor, spends about 80 percent of his worktime away from the office. He does not remember when he saw R. Carpenter or D. Taylor in Larry Strunk's office, but he saw each of them there several times. He does not recall the date or month of these visits. He testified that he never reported these visits by D. Taylor or R. Carpenter to anyone in management.

Vivian Cordell testified that when she was cross-training R. Carpenter on truck tickets there were times Cordell would have to leave for a few hours. Cordell does not know why. She complained to Stark and Taylor that R. Carpenter did not seem interested and was not available a lot. This was in the spring about 2 or 3 months before R. Carpenter's termination.

Deborah Huddleston testified that she complained to Clark Taylor some time in the spring before July 4 that she did not like Diane Taylor's attitude and had a hard time getting information from D. Taylor. She makes no mention about D. Taylor's alleged absences from the accounting department.

Respondent also called personnel secretary Mary Taylor and accountant Mark Teague to testify. Mary Taylor testified that she often saw Diane Taylor and R. Carpenter go into Larry Strunk's office in engineering, but she said nothing to management about this. Mark Teague relates that R. Carpenter was often absent from her work area during the summer of 1989 and it would often take her two or three times

to type something correctly. He told Stark about this, but Stark instructed him to give her a second chance. He has also seen Diane Taylor away from the department, but he did not complain about that because it caused him no problem.

Respondent has presented sufficient evidence to show in general that D. Taylor and R. Carpenter may well have gone on errands to the engineering department more than was absolutely necessary to perform their assigned duties, and, while there, stopped and talked to Strunk. The thrust of Respondent's argument is the reason for the excessive visits was the opportunity to stop enroute and chat with Strunk. To some degree the evidence Respondent relies on was not known to Respondent at the time of discharge. Yancey, Teague, and Mary Taylor did not report the visits of D. Taylor and/or R. Carpenter to management. Hamblin and Huddleston do not say whether they reported such incidents. Cordell asserts that although she reported R. Carpenter's absences from her cross-training sessions to both Stark and Clark Taylor it was some 2 or 3 months before the discharge. Evidence of this sort is not impressive, nor is Clark Taylor's vague testimony that he saw each of the two alleged discriminatees were absent from their department at least five or six times in the summer. There is no evidence touching on the reasons for these absences.

Larry Strunk's testimony that Croley and Hamblin visited his office more often than anyone else, Croley the most often, and Debbie Bishop was often in his office is uncontroverted. Hamblin and Bishop work in the engineering department, but no explanation was proffered as to why they should often visit Strunk's office. Croley worked in accounting and reasons for her to be in the engineering department and Strunk's office are also conspicuously absent. Here again the failure to present testimony from the various management officials who allegedly complained of the movements of D. Taylor and R. Carpenter, and therefore should have more precise recollections of exactly what did happen, casts considerable doubt on the very general undetailed representations of Stark and Clark Taylor.

With respect to the proffer of excessive use of the telephone as misconduct, R. Carpenter was the receptionist and switchboard operator responsible for receiving and routing calls coming in to Respondent's offices on 16 trunk lines and 60 extensions. She was obviously occupied with phone calls throughout the workday, and there is nothing more than general assertions by Clark Taylor and Stark, not particularly reliable witnesses as I have previously noted, to back up the charges of telephone misuse by either Ms. Taylor or R. Carpenter. Both deny excessive use of the phone, and D. Taylor credibly related, with no persuasive evidence to the contrary, that she only received two or three personal calls between August 15 and September 26, and that Croley would receive as many as seven incoming personal calls a day. There is no evidence Croley was chastised for phone misuse.

The claim of insubordination to Stark is equally vague. Respondent's posttrial brief, like the testimony of Stark and Clark Taylor, says D. Taylor and R. Carpenter were uncooperative and insubordinate to Stark but does not expressly explain what this means. A careful reading of the testimony of Clark Taylor and Stark and the "Performance Reviews" of the two ladies prepared by Stark on or about September 2 persuades me the claim of insubordination and lack of cooperativeness probably refers to the alleged failure to abide

by the instructions to refrain from leaving the department and from overuse of the telephone.

The events surrounding the preparation of the "Performance Reviews" on or about September 22 are most interesting. In the second week of September, Stark prepared annual evaluations on D. Taylor and R. Carpenter using the preprinted "Employee Performance Evaluation" form. On D. Taylor's he wrote, "Diane has the capabilities of being an excellent payroll clerk, she has well knowledge of the subject matter." For R. Carpenter's he wrote, "Becky has the capabilities of being a good receptionist and she has knowledge of her job." According to Stark's uncontroverted testimony on this topic, when he gave the forms to Clark Taylor the following colloquy ensued:

Clark said, This don't tell me anything. He said, What do you mean they have the capabilities? I said, Clark, they've been true blue, dedicated through their last reports and up through the first three months of this fiscal anniversary date here. And he said, Well, what are you telling me now? I said, Well, I can't give them a good review, and he said, Why not? And I said, Well, blah, blah, blah, and he said, Write it down.

Stark continues that he then decided there was not enough room on the forms for what he was going to write because "I tried to go into specifics because I wanted to protect myself but yet I wanted to give Clark ample information that he was asking for in detail." For these reasons, he wrote the evaluations in longhand on 8-1/2 by 11 stationery, three pages for D. Taylor and two for R. Carpenter. They read as follows:

DIANE TAYLOR
PERFORMANCE REVIEW
9-22-89

For the past four months Diane's dedication to her job has been limited to the routine, repetitive clerical functions. Diane shows lack of initiative to assist others in the accounting department or other departments. I feel that the routine payroll function is somewhat less than a 40 hr. week, particularly since Deborah has taken the salaried employees and Alice compiles the times for the surface employees. This should allow time for Diane to maintain payroll related accounts, assist in intercompany information projects requiring payroll information, and to perform other general clerical duties (personnel dept., safety dept., cost accounting, Alice's productivity reports, Deborah's salaried payroll, etc. all require Diane's payroll information.). However, I am continually receiving feed-back from those involved in these projects that there is a great deal of reluctance for Diane to co-operate in supplying the information. It is very common for Diane to express "I don't see why they need it" or that they could get the information somewhere else themselves.

Filling the gaps between payroll tasks is a function of self-supervision not easily monitored by anyone other than Diane, herself. Not only do I feel that these periods are not being utilized to the best interest of Gatliiff Coal Company, but I believe that these avail-

ability times are being disguised by frequent and lengthy phone conversations, personal intercompany relationships, and general slow down in productivity. The phone calls and general slow down is evidenced by personal observations and complaints by co-workers. For instance, on 9-22-89 I arrived at work at 8:00 am and found Diane on the phone (Diane arrived at 7:00 am). At 8:17 am, finding her still on the phone, I dialed the extension of L. Strunk to find his line busy. When he answered my call, Diane simultaneously hung up. Deborah, Larry, Mark, Dee, & Vickie, all have witnessed similar, although greater in length, whispering conversations.

The personal intercompany relationships are evidenced by personal observation and complaints from both within the department and outside the department, including complaints from various company administrators, supervisors, department heads, and coworkers. The common expression heard upon inquiring why Diane was away from her terminal was "Check L. Strunk's office or Teresa's"—more times than not, they were correct.

I made an attempt to remedy the situation by advising Diane, the afternoon of August 15, 1989, not to leave her work station or have anyone from another department enter her work station without notifying Clark or myself. This was strongly re-emphasized by Clark Taylor in the presence of myself and Becky on August 21, 1989. However, on both August 28th and 29th, L. Strunk entered Diane's work station with no notification. Furthermore, on September 5, 1989, Deborah Huddleston observed both Diane and Becky in the engineering department talking to L. Strunk—again no notification. This was during the close of the month when no time can be wasted.

I found it impossible to rely on Diane's ability to self-supervise and also recognized the impracticability to use my time to monitor her every move. The experience one could gather in 10 years with the company provided opportunity for advancement. However, Diane shows no desire to expand on her duties and abilities and shows an apathetic attitude toward her present tasks and willingness to work with others.

Please see attached reprimand dated April 3, 1989.

BECKY CARPENTER
PERFORMANCE REVIEW
9-22-89

For several months, through the use of a contract laborer, Becky's time has been made free in order to cross-train and relieve staff for vacations. However, not much progress was made past cross-training on payroll. Although Becky was needed on accounts payable and truck tickets it was with reluctance that Vickie would turn over a/p to Becky because of frequent errors due to carelessness and Becky never did quite catch the lack of truck tickets. Vivian and Sheila indicated that Becky showed no interest in learning to post truck tickets and even expressed that she didn't feel that she should have to since she was already back-up on payroll and accounts payable.

Instead of becoming [sic] proficient in her cross-training skills, she became preoccupied with lengthy phone conversations, personal intercompany relationships, and general work slow down. This was evidenced by personal observation and complaints from both within the department and outside the department, including complaints from various company administrators, supervisors, department heads, and coworkers. The common expression heard when I asked where Becky was when missed from her work station was "Check L. Strunk's office or Teresa's office"—more times than not, they were correct.

I made an attempt to remedy the situation by advising Becky on the afternoon of August 15, 1989, not to leave her work station or have anyone from another department enter her work station without notifying Clark or myself. This was strongly re-emphasized by Clark Taylor in the presence of myself and Diane on August 21, 1989. However, on August 28th, 1989 Becky was observed in Jim Faulkner's office (to pick up an application) then in Larry Strunk's office, with no notification. Furthermore, Becky has been observed on a regular basis in Teresa's office—again no notification. Today, Sept. 22, 1989, Becky spent all afternoon in Teresa's office typing a letter for Vivian. Because he "wanted it done right and couldn't wait on corrections, Mark re-typed it himself in approximately 15 min. (see attached).

Becky has lost interest in her job and has developed an apathetic attitude toward helping others. I am presently investigating missing phone bill records and phone call printouts which were Becky's responsibility to file.

The most interesting, and I believe significant, aspect of these "Performance Reviews" is the reason for their preparation. It is obvious from Stark's initial reluctance to severely criticize the performance of D. Taylor and R. Carpenter that he was not seeking their discharge. Clark Taylor told both the ladies on discharge that it was based on reports from Stark, yet it was Clark Taylor who insisted that Stark issue the adverse evaluations which, despite the authority exerted by Clark Taylor, do not recommend the two be dismissed. This is a circular transaction. Clark Taylor insisted on adverse evaluations by Stark, and then told the two women it was Stark's input that caused their separation. I am persuaded it was Clark Talor, not William Stark, who wanted to fire D. Taylor and R. Carpenter, and that the insistence on the adverse evaluations was designed to provide a plausible basis for those discharges. Clark Taylor's claim the decision was Shackleford's is not credited in the absence of Shackleford's testimony to the same effect. As previously noted, the absence of that testimony warrants an inference Shackleford would not furnish evidence favorable to Respondent if called. It is false to claim the dismissals were at Stark's instance. This whole sequence of Clark Taylor's insistence on the review he finally got indicates to me that he was attempting to build justification for the discharges.

What ultimate conclusion concerning the legitimacy of the discharges can be drawn from the conglomerate of facts, inferences, and preliminary conclusions reached to this point? The answer depends on whether concerted action is present,

whether that action is protected if it is in fact concerted, whether the General Counsel has set forth a prima facie case the terminations were precipitated by protected concerted activity, and, if General Counsel has such a prima facie case, would Respondent have taken the same action in the absence of the protected activity? The first step in the process of determining these issues is measuring the facts found against the guide set forth in *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), in the following terms:

In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity. [Footnotes omitted.]

and as recited in *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*),

We reiterate, our definition of concerted activity in *Meyers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.

Stark's remarks to R. Carpenter and D. Taylor at the August 15 meeting regarding Clark Taylor's desire to discharge them due to the rumor linking them to Larry Strunk illustrates that as far as Respondent was concerned there was one rumor involving Strunk's alleged relationship with both ladies rather than, as Respondent argues, two separate unrelated rumors. In any event, I agree with General Counsel that R. Carpenter and D. Taylor joined together in concertedly protesting to Shackleford and Clark Taylor what they considered, and I conclude was, a malicious rumor connecting them and Strunk in an adulterous relationship. This concerted protest was protected by the Act because it concerned harassment by fellow employees which created a difficult condition of employment for D. Taylor and R. Carpenter.⁷ The circulation of malicious rumors of adultery certainly constitutes psychological harassment of the subjects of the rumor. The evidence thus shows protected concerted activity known by Respondent to be concerted. That Respondent was concerned about the rumors and the protests raised by R. Carpenter and D. Taylor concerning them is evident from the various statements and conduct of Stark, Clark Taylor, and Shackleford relating to the rumors. There is no direct evidence Respondent discharged R. Carpenter and D. Taylor because the concertedly complained of the circulation of the rumor. It is well settled however that unlawful motivation may be proved by circumstantial evidence warranting an inference of such motivation.⁸ Here Respondent's reasons for discharge and the

⁷ See *NLRB v. Leslie Metal Arts Co.*, 509 F.2d 811, 814 (6th Cir. 1975), enfg. 208 NLRB 323 (1974).

⁸ *Elion Concrete, Inc.*, 299 NLRB 1 (1990), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

evidence proffered in support thereof will not survive close scrutiny. Clark Taylor and William Stark deal in circumlocution and generalities and are not convincing witnesses. Other members of management whose testimony would have been important, perhaps crucial, on several points were not called by Respondent, and the failure of these persons to testify raises the inference they would not have given testimony favorable to Respondent. Clark Taylor firmly posits insubordination and leaving work areas as the reasons for the discharges, but refers to other matters remote, insignificant, or false as supporting reasons. Clark Taylor directs William Stark to write unfavorable evaluations on the two women only 4 days before their discharge, and then tells them his action was based on Stark's recommendation even though Stark attempted to mollify Clark Taylor with a harmless evaluation of the two and had no intention of causing their discharge. The employees called by Respondent to support its cause give little assistance to Respondent, and some even deny informing Respondent's agents of any of the alleged absences from the work place Respondent relies on. There is un rebutted evidence that other employees engaged in conduct like that proffered as reason for the discharges, but there is no evidence of adverse action against these employees who are reported to have been guilty to a greater degree of the same alleged transgressions. After considering all these factors, I have concluded an inference of an unlawful motive is warranted and Respondent has in fact established no convincing lawful reasons for terminating the two employees who were evaluated as excellent the year before. Respondent has, in effect, offered unconvincing excuses rather than valid reasons.

Accordingly, I conclude the evidence shows the concerted complaints by D. Taylor and R. Carpenter concerning the rumors were protected, were a motivating factor in Respondent's decision to discharge them, and General Counsel has made out a prima facie case the Act has been violated. The burden rests on Respondent to prove D. Taylor and R. Carpenter would have been discharged in the absence of any protected activity. Respondent has not met that burden, and General Counsel has therefore proved by a preponderance of the credible evidence D. Taylor and R. Carpenter were discharged in violation of Section 8(a)(1) of the Act.⁹

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent violated Section 8(a)(1) of the Act by discharging Rebecca L. Carpenter and Diane Taylor on September 26, 1989, because they engaged in protected concerted activity.
3. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to the usual notice posting and cease-and-desist requirements, my recommended order will require Respondent to offer Rebecca Carpenter and Diane Taylor immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without

prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings suffered as a result of the discrimination against them. Backpay shall be calculated and interest computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹⁰ I shall further recommend that Respondent be required to remove from its files any reference to the discharges of Rebecca Carpenter and Diane Taylor, and notify them in writing that this has been done and that the discharges will not be used against them in any way.¹¹

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The Respondent, Gatcliff Coal Company, Nevisdale, Kentucky, if officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Rebecca Carpenter and Diane Taylor immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the discharges of Rebecca Carpenter and Diane Taylor on September 26, 1989, and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business and current construction projects copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall

¹⁰ Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 6621.

¹¹ *Elion Concrete, Inc.*, supra.

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁹ *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 46 U.S. 393 (1983).

be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employees because they engage in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Rebecca Carpenter and Diane Taylor immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the discharge of Rebecca Carpenter and Diane Taylor on September 26, 1989, and notify them in writing that this has been done and that the discharge will not be used against them in any way.

GATLIFF COAL COMPANY